IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

**No. 72-782**

GATEWAY COAL COMPANY,

*Petitioner,*

*vs.*

UNITED MINE WORKERS OF AMERICA, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

and

## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae*.[1] In support of this motion, the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States. The Chamber previously was granted leave by the Court to submit a brief *amicus curiae* in support of the petition for writ of certiorari.

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1. Pursuant to Rule 42 of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner gave such consent, but counsel for Respondents declined to do so.

2. This case presents the question of whether a grievance, because it is not expressly provided for in the broad arbitration clause of a collective bargaining agreement, may be found non-arbitrable and thereby bar the injunction of a strike in violation of a contractual no-strike agreement. Prior to the decision in this case, it had been assumed that, "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the *most forceful evidence* of a purpose to exclude the claim from arbitration can prevail." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-5 (1960) (emphasis added). A strike "over a grievance which both parties are contractually bound to arbitrate", moreover, was enjoinable. *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 254 (1970). The opinion below, however, has seriously eroded these principles. It has created a major area where economic warfare, rather than arbitration, is to be the means of dispute resolution. A strike over *any* matter the parties have agreed is arbitrable should be subject to injunctive relief under *Boys Markets*. There should be no exceptions; no "sui generis" situations. The contrary view taken by the Court of Appeals in the instant case, as well as that recently enunciated by the Fifth Circuit in *Amstar Corporation* v. *Amalgamated Meat Cutters*, 468 F. 2d 1372 (1972), is, therefore, wrong. It should be corrected by this Court.

3. The other issue here presented—whether a concerted refusal to work because of a subjective apprehension of danger, absent objective supporting evidence, is protected under Section 502 of the National Labor Relations Act (29 U. S. C. § 143) —is also a matter of far-reaching importance. Prior to the decision below, the "controlling factor" in determining the applicability of Section 502 to work stoppages was "not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered abnormally dangerous." *Redwing Carriers*, 130 NLRB 1208, 1209 (1961).

The court below, however, would establish, as Judge Rosenn noted in his dissent (Pet. for Cert., App. C, p. 22a), a "new test . . . that '[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .,' they need not arbitrate." This novel approach, occurring in an area of numerous disputes, fails to harmonize the Act with other federal and state legislation specifically designed to deal with occupational health and safety. It, therefore, also requires reversal by this Court.

For the foregoing reasons, the Chamber respectfully requests leave to present its views.

Respectfully submitted,

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## BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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This brief *amicus curiae* on behalf of The Chamber of Commerce of the United States of America is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

### INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae*.

## ARGUMENT

### I

### The Decision Below Conflicts with the Arbitration Principles Established by This Court

1. This Court has repeatedly "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and [has] cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 243 (1970). Accordingly, "an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583, 584 (1960) (emphasis added). See also *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 105 (1962), where, even in the absence of an explicit contractual provision, this Court implied an agreement not to strike on the basis that a "contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitution for economic warfare"; *International Union of Operating Engineers, Local 150* v. *Flair Builders*, .... U. S. ...., 32 L. Ed. 2d 248, 252 (1972), where this Court held that, in a situation involving an agreement to arbitrate "any difference", the parties were bound to arbitrate even a claim that particular grievances were barred by laches; and *Avco Corp.* v. *Local Union No. 787, U. A. W.*, 459 F. 2d 968, 973 (7th Cir. 1972). The controlling principle, in short, has been that unless arbitration of a grievance is specifically precluded by the parties, the dispute is arbitrable. There have been no exceptions; no "sui generis" situations.

The court below disregarded these precepts. Notwithstanding the absence of an express exclusion, the decision below

created its own exception to the parties' all-inclusive arbitration agreement.[1] The court thus took a diametrically opposite view from the Trilogy[2] and other decisions noted above. It placed the burden on the party seeking arbitration to show that it was either "particularly stated [or] unambiguously agreed" that the dispute would be arbitrable—indeed, "safety disputes", however that term may be construed, are to be presumed *not* arbitrable. Pet. for Cert., App. C, pp. 16a, 18a. The result is a gaping loophole in the national labor policy of promoting arbitrability; few contracts are so far-sighted as to expressly provide for the arbitration of "safety disputes" or other particular classes of grievances.[3] A collective bargaining agreement, after all, is

1. The contract in this case contains an arbitration provision providing that "all disputes and claims which are not settled by agreement shall be settled by arbitration" (Pet. for Cert., App. C., p. 6a), a clause virtually identical to that involved in *Boys Markets*. See 398 U. S. at 237, n. 1. It is immaterial that, following the commencement of this litigation, this provision was modified so as to provide a special arbitration procedure for the resolution of health and safety disputes. The contract involved in the instant case presents the typical situation (see n. 3, *supra*) and, accordingly, appropriately raises the important questions here at issue.

2. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra; United Steelworkers of America* v. *Enterprise Corp.*, 363 U. S. 593 (1960). These decisions, commonly referred to as the Trilogy, emphasized that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling *every and all* disputes under the agreement." 363 U. S. at 567 (emphasis added).

3. "About 94% of contracts provide for arbitration of grievances not settled by the parties themselves." 51 *Collective Bargaining—Negotiations and Contracts*, p. 6 (Washington, D. C.: BNA, Inc. 1970). Of these contracts, only 38% contain any limitation upon the scope of arbitration. Restriction of safety dispute arbitration, the issue involved in this case, is so minimal that the Bureau of National Affairs in the above study did not even list safety disputes as one of the "prevalent exclusions" from arbitration. Further, in the most recent study prepared for the Bureau of Labor Statistics of the Department of Labor, only "about 5% of the grievance provisions, covering 9% of the workers, . . . listed one or more specific issues that were excluded from the grievance process." None of these issues related to safety disputes. See Solby & Cunningham, *Grievance Procedures in Major Contracts*, BLS Bulletin 1425-1 (Department of Labor, Bureau of Labor Statistics, 1965).

only a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Warrior & Gulf*, 363 U. S. at 579. A strike over any matter, therefore, should be subject to injunctive relief under *Boys Markets*. The contrary view taken by the Court of Appeals in the instant case, as well as that recently enunciated by the Fifth Circuit in *Amstar Corporation* v. *Amalgamated Meat Cutters*, 468 F. 2d 1372 (1972), is wrong. It should be corrected by this Court.

2. The Trilogy also admonished that "it is the arbitrator's construction which was bargained for; . . . and the courts have no business overruling him because their interpretation of a contract is different from his." *Enterprise Corp.*, 363 U. S. at 599.[4] The decision below, however, squarely conflicts with a well-reasoned decision of an arbitrator finding that the instant dispute was arbitrable and that there was no safety hazard. Pet. for Cert., App. C, pp. 44a-51a. This decision, clearly rendered within the arbitrator's authority and in accord with the parties' agreement, was "final and binding upon the parties." *Humphrey* v. *Moore*, 375 U. S. 335, 351 (1964). The Court of Appeals, however, in lieu of this determination as well as similar judgments by the District Court and the Pennsylvania Department of Environmental Resources, substituted its own view as to the resolution of the parties' dispute. In effect, it rewrote the parties' agreement to provide an exception to the

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4. In *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1933, 1934 (1971), the National Labor Relations Board recently recognized that disputes arising under a labor agreement "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." Accordingly, the Board held that it will defer, in certain circumstances, "to the arbitration clause conceived by the parties." 77 LRRM at 1936. See also *Ries* v. *Reynolds Metal Co.*, .... F. 2d ...., 5 FEP Cases 1 (5th Cir. Sept. 20, 1972), which enunciated a similar policy of deferral under Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000-e, *et seq.*), an issue which is now before this Court. *Alexander* v. *Gardner-Denver Corp.*, No. 72-5847, *cert. granted* February 20, 1973.

contractual arbitration provisions. The Court had no such power. *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

3. In *Boys Markets*, this Court did not differentiate, as does the court below (Pet. for Cert., App. C, p. 18a, n. 1), between economic and safety disputes. There is no authority for such a distinction;[5] indeed, the objective of *Boys Markets* to promote the "expeditious settlement of industrial disputes without resort to strikes, lock-outs, or other self-help measures" (398 U. S. at 249) would be seriously vitiated by exempting safety disputes from the equitable relief provided for therein. Grievances involving disputes arising out of allegedly dangerous working conditions frequently occur, and are frequently arbitrated.[6] The Court

5. See, e.g., *Atlantic Richfield Co.* v. *Oil, Chemical and Atomic Workers International Union*, 447 F. 2d 945 (7th Cir. 1971), holding, in a virtually identical situation to that here at issue, that a district court had jurisdiction, following *Boys Markets*, to grant equitable relief; and *Hanna Mining Co.* v. *Steelworkers*, 464 F. 2d 565 (8th Cir. 1972), similarly upholding an injunction of picketing, in violation of a contractual no-strike agreement, over an alleged safety hazard. Although *Hanna* attempted to distinguish the present case on the ground that the agreement there specifically required that safety disputes be submitted to arbitration, this is a tenuous distinction. As previously shown, the instant agreement, by not specifically excluding safety disputes, must also be construed so as to permit their arbitrability. Moreover, the thrust of the decision below—and where it materially differs from *Hanna*—is the Third Circuit's erroneous view that, since safety disputes are "sui generis", *even* if the contract here had specifically required the arbitration of such disputes, injunctive relief would still have been denied.

6. See, e.g., *nited States Steel Corp.*, 51 L. A. 571 (1968), and *Carmet Corp.*, 52 L. A. 790 (1969). The Bureau of National Affairs, Labor Arbitration Series, in fact, has published, since 1963, more than 50 awards dealing with safety disputes. Commerce Clearing House's Labor Arbitration Award Series has similarly published, subsequent to 1961, more than 100 awards on the same subject. Many, if not the majority, of these awards concern the issue of whether, under a particular contract, employees may engage in a work stoppage when exposed to allegedly dangerous working conditions, the very issue in this case. See Labor Arbitration, Cumulative Index and Digest, BNA Nos. 118,658 and 124,70; Labor Arbitration Awards, Commerce Clearing House, Topical Index Digest, Topic: Safety; and the cases noted in the Chamber's motion for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari, n. 2.

of Appeals' approach undermines this sound industrial relations practice. It fosters the very dangers which *Boys Markets* sought to preclude: "aggravate[d] industrial strife . . . [a] delay [in the] . . . early resolution of the difficulties between employer and union . . . [and denial of] the only effective means by which to remedy the breach of the no-strike pledge and thus effectuate federal labor policy." 398 U. S. at 248 and n. 17.

## II.

### The Decision Below Erred in Its Interpretation of Section 502 of the National Labor Relations Act, 29 U. S. C. § 143

1. The National Labor Relations Board and every court which has heretofore considered the application of Section 502 of the National Labor Relations Act, 29 U. S. C. § 143, to a work stoppage over alleged "abnormally dangerous working conditions" interpreted that "term [to] contemplate . . . an objective as opposed to a subjective test." *Redwing Carriers*, 130 NLRB 1208, 1209 (1961). The controlling consideration has not been "the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Stop & Shop, Inc.*, 161 NLRB 75, 76, n. 3 (1966).[7] The "entire thrust" of the decision below, however, is different; in the Court of Appeals' opinion it is the employees "themselves who should make the determination as to what constitutes a safety hazard." *United States Steel Corp.* v. *United Mine Workers*, 469 F. 2d 729 (3rd Cir. 1972).

The decision below thus construes Section 502 as involving a subjective employee assessment, rather than an objective third

7. See also *Curtis Mathes Manufacturing Company*, 145 NLRB 473 (1963); *Fruin-Colnon Company*, 135 NLRB 737 (1962), *enf'd.* 303 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964); *N. L. R. B.* v. *Knight Morely Corp.*, 251 F. 2d 753 (6th Cir. 1957), *cert. den.* 357 U. S. 927 (1958); *Philadelphia Marine Trade Association*, 138 NLRB 737, *enf'd.* 330 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964).

party decision, as to what constitutes a dangerous working condition. This reliance on the shifting "attitudes, fancies and whims" of employees "runs directly counter", as Judge Rosenn noted in his dissent, "to our national labor policy of promoting labor stability," and permits the subversion of any no-strike agreement merely by the "naked assertion" of an employee that a particular working condition "constitutes a safety hazard." Pet. for Cert., App. C, p. 22a. Arbitrators, notwithstanding their unique expertise and central role in industrial self-government (*Warrior & Gulf*, 363 U. S. at 581-2), have been relegated to an inferior, if not non-existent, role. This approach, as *Boys Markets* concluded with respect to a similar effort to undercut arbitration, manifestly "casts serious doubt upon the effective enforcement of a vital element of stable labor-management relations . . . [and] does not make a viable contribution to federal labor policy." 398 U. S. at 249.

2. The approach of the court below is particularly anachronistic in light of the substantial state and federal legislation that has been recently enacted governing industrial safety. There is now a comprehensive statute, the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.*, which requires safe working conditions for virtually every employee, not covered by other federal safety regulations, in the Nation.[8] There

8. That Act specifically covers the "abnormally dangerous" situation which Respondents assert to have been present here. Federal district courts are empowered, at the petition of the Secretary of Labor, to restrain any conditions or practices where "a danger exists which could reasonably be expected to cause death or serious physical harm." 29 U. S. C. § 662(a). In addition, if the Secretary of Labor arbitrarily fails to seek such relief, an endangered employee can compel such an action by writ of mandamus. 29 U. S. C. § 662(d). Thus, employees covered under the Act are assured that the Secretary will "act immediately to shut down the entire operation or that portion of it that threatens death or serious physical harm." Spann, *The New Occupational Safety and Health Act*, 58 A. B. A. J. 255 (1972). Significantly, the applicable standard is the objective criteria rejected here by the Court of Appeals; 29 U. S. C. § 662(b) specifically provides that the restraint proceedings shall be governed by Rule 65, F. R. C. P., which re-

is also, in the circumstances of this case, the federal Coal Mine Health and Safety Act, 30 U. S. C. § 801 *et seq.*, termed by President Nixon "the most significant piece of legislation ever developed with respect to coal mining in the United States",[9] and extensive state coal mine safety legislation.[10] And employees who engage in a concerted action to protest a dangerous working condition are protected against employer retaliation by the National Labor Relations Act.[11] Today, therefore, regardless of the situation that may have previously existed, a strike is not the only means whereby employees may express their understandable concern about safety. There are immediately available,

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quires, where possible, a hearing to show the specific facts which gave rise to the alleged irreparable injury.

9. Schmidt, *Selected Important Features and Background of the New Federal Coal Mine Health and Safety Act of 1969*, 3 Natural Resources Lawyer 241 (1970). See also Snow and Wheeler, *Proposals for Administrative Action under the Federal Coal Mine, Health and Safety Act of 1969*, 3 Natural Resources Lawyer 248, 264 (1970) ("A significant and far reaching attempt to improve health and safety conditions in the coal mining industries"). The Act, in addition to providing safety standards for underground mines, 30 U. S. C. § 811, and enforcement of those standards, 30 U. S. C. § 813, also affords, 30 U. S. C. § 814(a), specific injunctive protection for miners against the situation here present, alleged "imminent dangers". Again, however, the statute employs an objective, third-party test; only after a representative of the Secretary of the Interior finds that an "imminent danger" exists is an order issued requiring that all persons be withdrawn immediately from the endangered area and prohibited from entry until the Secretary determines the danger no longer exists.

10. See, e.g., The Bituminous Coal Mine Act, Pa. Stat. Ann., Title 52, § 70-101, *et seq.*, which allows (§ 70-120-1) inspectors, upon discovery of conditions which jeopardize life or health, to order miners to cease work at once or obtain a prompt investigation, as to the inspector's findings, by a commission. The criteria again is an objective, third-party evaluation. Pennsylvania, it should be noted, "has provided the best standards for mine safety in the nation" and has "the lowest injury rate in both fatal and non-fatal accident categories" of any of the four leading coal-producing states. Comment, *The 1969 Coal Mine Health and Safety Act: A Survey of Mine Safety Legislation in Pennsylvania*, 31 U. Pitt. L. Rev. 665, 669, 673 (1970).

11. See, e.g., *N. L. R. B.* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

easily accessible and far more effective alternatives. Encouraging resort to these alternatives, in contrast to the decision below, would also achieve a desirable accommodation between federal labor and safety legislation.

## CONCLUSION

For all the foregoing reasons, as well as for the reasons set forth by the Petitioner, it is respectfully urged that this Court reverse the decision of the Court of Appeals.

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